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No. 00-914

In the Supreme Court of the United States

CHILDREN'S HEALTHCARE IS A LEGAL DUTY, INC., ET AL.,
PETITIONERS,

v.

MICHAEL MCMULLAN, IN HIS OFFICIAL CAPACITY AS
ACTING DEPUTY ADMINISTRATOR, HEALTH CARE FINANCE
ADMINISTRATION, ET AL.,

THE FIRST CHURCH OF CHRIST, SCIENTIST, RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE FIRST CHURCH OF CHRIST, SCIENTIST

TERRENCE J. FLEMING
ANSIS V. VIKSNINS
Lindquist & Vennum, PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

MICHAEL W. MCCONNELL
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Respondent The First Church of Christ, Scientist

40 pp

QUESTION PRESENTED

Whether the Establishment Clause permits Congress to reimburse secular, nonmedical nursing care services for poor and elderly Americans who qualify for federal health care assistance under Medicare and Medicaid but cannot accept the medical component of such assistance without violating their faith.

RULES 29.6 AND 14.1 STATEMENT

Respondent The First Church of Christ, Scientist has no parent corporation and issues no stock.

Petitioners are:

Children's Healthcare Is A Legal Duty, Inc.

Bruce Bostrom

Steven Peterson

Respondents are:

Michael McMullan, in his official capacity as Acting Deputy Administrator of the Health Care Finance Administration

Tommy Thompson, in his official capacity as Secretary of the United States Department of Health and Human Services

The First Church of Christ, Scientist

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BRIEF IN OPPOSITION FOR RESPONDENT THE FIRST CHURCH OF CHRIST, SCIENTIST

Since their inception in 1965, Medicare and Medicaid ("the Programs") have contained numerous provisions accommodating religious convictions regarding health care, so as to ensure that all Americans can participate in the Programs in a manner consistent with their religious beliefs. This case involves one such provision. Petitioners claim that the Establishment Clause does not permit Congress to accommodate religious beliefs by funding nonmedical nursing care services for poor and elderly Americans who qualify for federal health care assistance but who cannot accept the medical component of such assistance without violating their faith. Both of the lower courts rejected this claim and upheld the Programs in their entirety. Those decisions correctly apply prior law declared by this Court, and they conflict with no decision in any other circuit. Accordingly, certiorari should be denied.

STATEMENT OF THE CASE

A. The Medicare and Medicaid Programs

Medicare Part A pays for hospital care, and post-hospitalization care provided by skilled nursing facilities, home health agencies, and hospices, for "[e]very individual" who "has attained age 65" and is eligible for Social Security. 42 U.S.C. §§ 426(a), 1395c, 1395d. Medicare is funded by compulsory payroll deductions and self-employment taxes under the Federal Insurance Contributions Act. Medicaid, which is funded by general tax revenues, provides grants to the States to provide similar health care assistance to the needy. *Id.* § 1396. Virtually all Americans, including Christian Scientists, must pay taxes to support the Programs. Pet. App. 3.

Patient choice is a central feature of Medicare and Medicaid. 42 U.S.C. § 1395a; see HCFA, MEDICARE: HOSPITAL MANUAL § 100 (1993). In addition to traditional medicine, patients may elect a wide range of treatment methods, including osteopathy,

podiatry, chiropractic, psychology, and physical therapy. See, *e.g.*, 42 U.S.C. §§ 1395x(r), 1395k(a)(2)(B)-(C), 1396d(a)(11). Hospice care, which includes the services of social workers and pastoral counselors, is also covered. *Id.* § 1395x(dd).

Several provisions ensure that the Programs do not interfere with the religious beliefs of patients or providers. Medicaid recipients, for example, may not be compelled to "accept any * * * health care or services" (other than to prevent contagious diseases) if they "objec[t]* * * thereto on religious grounds." 42 U.S.C. § 1396f; see also *id.* § 1395a. A similar protection extends to providers. *Id.* § 300a-7(d).

Consistent with this philosophy, eligible patients may seek care at the hundreds of hospitals operated by various religious denominations, as well as at secular institutions. See AMERICAN HOSPITAL ASS'N, GUIDE TO THE HEALTH CARE FIELD B8 *et passim* (1995) (noting nearly 600 church-related hospitals, with 130,000 beds, in multi-hospital systems alone) (C.A. App. 631); C.A. App. 751. Many such facilities employ chaplains, maintain chapels, display religious symbols, provide Bibles and other religious literature, and are governed by religious mission statements. See, *e.g.*, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, *reprinted in* 24 ORIGINS 449 (1994) (C.A. App. 633).

B. The Original Accommodations of Christian Science Nursing Care

Spiritual healing, through prayer alone, is central to the practice of Christian Science. Although Christian Science does not teach that accepting medical care is wrong or sinful, faithful adherents believe that "reliance on medical treatment clearly departs from the practice of Christian Science." *Christian Scientists and the Practice of Spiritual Healing* 51 (1991) (C.A. App. 319). Those who practice Christian Science therefore eschew reliance on components of health care provided under the supervision or control of medical doctors or institutions.

Accordingly, when Medicare and Medicaid were first under consideration, representatives of Christian Science requested "exemption from that portion of the social security and railroad retirement taxes which would be allotted to pay for" medical health insurance, since they would not be able to accept such benefits without violating their religious convictions. HEALTH SERVICES FOR THE AGED UNDER THE SOCIAL SECURITY INSURANCE SYSTEM: HEARINGS ON H.R. 4222 BEFORE THE HOUSE WAYS & MEANS COMM., 87th Cong., 1st Sess. 728-729 (1961) ("HEARINGS ON H.R. 4222") (testimony of J. Buroughs Stokes). Congress enacted such an exemption in the case of the Amish. See 26 U.S.C. § 1402(g). In the case of Christian Science, however, Congress instead enacted a "benefit of hospitalization" broad enough to include seriously ill patients relying on Christian Science for healing. HEARINGS ON H.R. 4222, at 729 (statement of Chairman Mills).

Congress accomplished this by including physical nursing care provided in Christian Science nursing facilities to the same extent that comparable nonmedical elements of nursing care would be covered for hospitalized patients. *E.g.*, 42 U.S.C. §§ 1395x(e), 1395x(y)(1); 42 C.F.R. § 440.170(b)(2) (1996). Christian Science nursing care, which is distinct from the strictly religious healing work of Christian Science practitioners, is provided by skilled non-medical personnel, who provide many of the same basic nursing services that are provided to patients in hospitals, only without medical involvement. Pet. App. 30; C.A. App. 183, 190, 560-562, 818.[1] Christian Science nursing facilities, or "sanatoria," serve patients who are "unable to take physical care of [themselves] as a result of an acute condition," and thus "would be confined

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[1] The high quality of these services has been noted by secular sources. See, *e.g.*, Noreen C. Frisch, *Examination of an Alternative Approach to Nursing: The Christian Science Nurse*, 7 J. HOLISTIC NURSING 6 (1989) (C.A. App. 671); James H. Holmes, *et al.*, *Pressure Sores in a Christian Science Sanatorium*, 14 AM. J. FORENSIC MED. & PATHOLOGY 10 (1993) (C.A. App. 667).

in a hospital if they were not relying entirely on Christian Science for healing." SOCIAL SECURITY: HEARINGS ON H.R. 6675 BEFORE THE SENATE FINANCE COMMITTEE, 89th Cong., 1st Sess. 698 (1965). Such facilities are independent of the Church and exist only to serve patients' health care needs.[2]

Congress exempted such nursing services and facilities from medical oversight, which is both unnecessary in light of the facilities' nonmedical character and inconsistent with Christian Scientists' religious exercise. 42 U.S.C. §§ 1320c-11, 1395x(e), 1396a(a), 1396g(e); S. REP. NO. 404, 89th Cong., 1st Sess. 30 (1965); H.R. REP. NO. 231, 92d Cong., 1st Sess. 120 (1971). While exempted from medical regulation, however, Christian Science nursing facilities have always been subject to generally applicable state licensing, fire, sanitation, building, and various other safety regulations. See *ibid.*; C.A. App. 577.

Payments for services furnished by Christian Science sanatoria were limited to nonmedical nursing services comparable to those provided in medical facilities. As noted in the Senate Report that accompanied adoption of the original Programs:

> [T]he committee intends that payments to Christian Science sanatoriums would cover costs of services ordinarily furnished by these sanatoriums to patients which are comparable to those for which payment could be made to hospitals and intends these sanatorium services to be a substitute for, and not an addition to, medical services that might be furnished to a person if his religious beliefs were not contrary to the use of the usual facilities.

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[2] Contrary to petitioners' suggestion (at 10), it is undisputed that admittance to sanatoria is not limited to Church members. Admissions are limited to those pursuing healing through Christian Science, but one may practice Christian Science, and engage a Christian Science practitioner, while belonging to another religious denomination or no denomination at all. C.A. App. 560, 571.

S. REP. NO. 404, at 30. Church representatives never requested, and Congress did not provide, coverage for the cost of *spiritual* healing, which is performed by Christian Science *practitioners*, not by Christian Science *nurses* or nursing facilities. HCFA, MEDICARE: CHRISTIAN SCIENCE SANATORIUM SUPPLEMENT § CS-100 (1995); C.A. App. 168, 569.

C. The *CHILD I* Litigation

The accommodations enacted by Congress in 1965 were administered without challenge for more than 30 years. In *Children's Healthcare Is A Legal Duty, Inc.* v. *Vladeck*, 938 F. Supp. 1466 (D. Minn. 1996) ("*CHILD I*"), however, petitioners filed suit, alleging that those accommodations violated the Establishment Clause under several theories. See Pet. App. 85. The district court upheld the accommodations in all but one respect: they "authorize[d] exemptions to the programs in expressly sectarian terms." *Id.* at 106. The court had no trouble concluding that it was permissible to include Christian Science nursing facilities within the Programs while exempting them from regulations inconsistent with religious nonmedical care. The accommodations served a "compelling interest" in avoiding a burden on religious exercise and, apart from their sect-specific character, were "laudable." *Id.* at 104, 107. Because the court could not "assume that there is not nor will there ever be a group in a situation similar to that of the Christian Scientist[s]," however, it was unlawful for the statute to "explicitly address institutions of a single religion." *Id.* at 89, 109.

D. The 1997 Amendments to the Accommodations

In response to the district court's decision in *CHILD I*, Congress amended the Programs. Whereas the original statutes limited eligibility to "Christian Science sanatori[a]," the amendments extend to any "religious nonmedical health care institution" ("RNHCI"). 42 U.S.C. § 1395x(ss)(1). Congress's "sect-neutral accommodation [is] available to *any person* who

is relying on a religious method of healing and for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs." H.R. CONF. REP. NO. 217, 105th Cong., 2d Sess. 768 (1997) ("H.R. CONF. REP.") (emphasis added); see also 64 Fed. Reg. 67028, 67029 (Nov. 30, 1999) ("Services furnished in any facility that meets the definition of an RNHCI may qualify for payment, not just those provided in Christian Science sanatoria"). Such an approach, Congress found, would "serv[e] the interest of religious freedom" while "avoid[ing] the unfairness of requiring these Americans to pay taxes, including payroll taxes to the Medicare Trust Fund, for years without being able to receive any benefits." H.R. CONF. REP. at 768.

The amendments define a religious nonmedical health care institution as one that, among other things, "provides only non-medical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs," and that "on the basis of its religious beliefs, does not provide * * * medical items and services * * * for its patients." 42 U.S.C. § 1395x(ss)(1)(C), (F). Eligible RNHCIs may not be owned by or affiliated with a medical provider. *Id.* § 1395x(ss)(1)(G). Congress determined that these "detailed eligibility criteria" are "necessary to protect the health and safety of patients in such institutions and to prevent fraud and abuse." H.R. CONF. REP. at 769.

As with prior law, "[r]eimbursable services are limited to nonmedical nursing services and related items, comparable to services and related nursing materials supplied to inpatients in a hospital or a medical skilled nursing facility." H.R. CONF. REP. at 768. In that regard, 42 U.S.C. § 1395i-5(a)(2) explicitly states that "payment * * * may be made for inpatient hospital services or post-hospital extended care services furnished an individual in a religious nonmedical health care institution only if * * * the individual has a condition such that the individual

would qualify for benefits under this part for inpatient hospital services or extended care services, respectively, if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not such an institution."[3]

Similarly, Congress provided that "[n]o payments can be made for the services of those who provide spiritual treatment through prayer; and, therefore, in the case of Christian Scientists, for example, no payments can be made for the services of the Christian Science practitioner." H.R. CONF. REP. at 768. As explained in the statute's implementing regulations, "[n]either Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities." 64 Fed. Reg. at 67043; see also *id.* at 67029 ("the cost of using a religious practitioner [is] the financial responsibility of the patient"). Only "services and items [that] are plainly secular in nature" are reimbursable. H.R. CONF. REP. at 768.[4]

E. Proceedings Below

On August 6, 1997, the day after enactment of the amended statutes (and before adoption of any implementing regulations), petitioners again sued to challenge Congress's accommodation of religious nonmedical health care. They asserted that the amended statutes "effectively replicate the prior unconstitutional provisions" and "thereby effectively discriminat[e] among religious sects." C.A. App. 1-2. Along with their claim

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[3] Like the prior statute, the amended statute "requires the RNHCI to be operated under all Federal, State, and local laws." 64 Fed. Reg. at 67034. These include, among others, extensive federal regulations relating to "patients' rights," "food services," "staffing," "physical environment," "safety from fire," and "utilization review." *Id.* at 67032-67036.

[4] Petitioners assert that "substantial religious activity * * * is paid for by Medicare's reimbursement of the sanatoria's entire costs of operation." Pet. 10. Not only is this statement unaccompanied by any citation to the record or to factual findings of the lower courts, it is contradicted by the statutory language, legislative history, and implementing regulations.

that the statutes remain sect-specific, petitioners raised the same claims that were raised — and rejected — in *CHILD I*.

On cross motions for summary judgment, the district court sustained the constitutionality of the challenged provisions. The court first dismissed the contention that the amended provisions are sect-specific, and thus subject to strict scrutiny under *Larson* v. *Valente*, 456 U.S. 228 (1982). "[U]nlike the statutory provisions at issue in *CHILD I*," the court found, "the present amendments do not expressly refer to a religious denomination." Pet. App. 64. Because the amendments were not "intended to discriminate," but simply "to ensure more egalitarian access to health care benefits," strict scrutiny was inapplicable. *Ibid.*

The district court considered petitioners' remaining claims under the framework established by *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). With respect to *Lemon*'s "secular purpose" prong, the court held that the amendments further a legitimate secular interest in ensuring access to health care benefits in a manner that respects the conscience of religious beneficiaries. Pet. App. 64-68. In reaching this conclusion, the court expressly rejected the claim that the program provides "special benefits" to its beneficiaries (*id.* at 65):

> [N]onmedical nursing services, including such things as feeding, cleaning, clothing, and other aspects of physical maintenance, can be "unbundled" from medical nursing services. As such, a resident of a RNHCI would not be receiving "special" benefits. Such an individual would receive basic care without any medical component, meaning that they would receive a *subset* of normal services rather than "special" benefits *above and beyond* the norm.

Turning to *Lemon*'s "primary effect" prong, the district court held that it does not favor religion to adjust program requirements so as to enable religious minorities to receive "widely available public benefits." Pet. App. 69. Quoting

Sherbert v. *Verner*, 374 U.S. 398, 409 (1963), the court held that such accommodation "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." Pet. App. 69. Finally, the court determined that the Programs do not violate *Lemon*'s "entanglement" prong. *Id.* at 70-72.[5]

The court of appeals affirmed, concluding that the statutes were a valid accommodation of religion under settled Supreme Court precedent. Writing for the court, Chief Judge Wollman began by noting that "discriminat[ion] among religions * * * can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation." Pet. App. 7, 8. But the court rejected the claim that the statutes failed this standard, stating that petitioners' view of the statutes "as nothing more than an attempt to 'reinstate' to Christian Scientists the benefits invalidated in *CHILD I* is supported only by a selective and strained reading of the legislative history. A more accurate reading * * * reveals that the legislative impetus behind section 4454 was to accommodate all persons who object to medical care for religious reasons, not only Christian Scientists." *Id.* at 8-9. Noting that one may qualify for the accommodation "simply by stating that he or she is 'conscientiously opposed' to medical treatment and that such treatment is 'inconsistent with his or her sincere religious beliefs,'" the court concluded that the statutes' "terms,

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[5] Petitioners moved to amend the judgment pursuant to Fed. R. Civ. P. 60(a). They asserted that the district court "failed to consider 'that the statutes on their face direct federal funds to pervasively sectarian institutions' and that 'as applied to the Christian Science sanatoria, the federal funds paid by the Medicare and Medicaid programs are directed to pervasively sectarian institutions and finance specific religious activity.'" C.A. App. 917. The court denied the motion, explaining that it had "considered these arguments and found them unpersuasive." *Ibid.*

legislative history, and effect all suggest denominational neutrality." *Id.* at 8.[6]

Having found that the provisions at issue were sect-neutral, the court of appeals turned to a *Lemon* analysis. Noting that "alleviation of a special, government-created burden on religious belief and practice constitutes a valid secular purpose under *Lemon*," the court concluded that the statutes remove such a burden. Pet. App. 14. "By extending nonmedical health care benefits to individuals who object for reasons of religion to medical treatment, section 4454 spares such individuals from being forced to choose between adhering to the tenets of their faith and receiving government aid, and in so doing removes a burden that the law would otherwise impose." *Id.* at 15.

As for *Lemon*'s "effects" prong, the court of appeals joined the district court in rejecting petitioners' claim that beneficiaries of the accommodations receive a "special benefit" of "custodial care." Pet. App. 21. That argument "ignore[s] the fundamental principle upon which section 4454 is based"—that the statute reimburses RNHCI services "'only if the individual has a condition such that the individual would qualify for benefits * * * if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not [an RNHCI].'" *Id.* at 22-23 (quoting 42 U.S.C. § 1395i-5(a)(2)). The court thus recognized that the Act "extends to RNHCI patients only those benefits that they could have received if they had sought

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[6] The Eighth Circuit also rejected the claim that the statute's eligibility requirements evidenced an intent to favor Christian Scientists. Petitioners argued that there was no valid reason to limit participation to facilities that provide no medical care, employ no medical personnel, and have no medical affiliates. But as the court explained, these limitations both "ensure that only those facilities that provide no medical care are exempt from the medical oversight requirements" and enable the government, in monitoring compliance, "to focus its time and resources on patients concentrated in a relatively small number of facilities, rather than on patients in thousands of health care institutions nationwide." Pet. App. 11.

treatment at a medical institution, and then only a subset, *i.e.* the nonmedical portion, of those benefits." *Id.* at 23.[7]

Addressing *Lemon*'s "entanglement" prong, the court of appeals rejected the claim that the statute "delegates Medicare and Medicaid coverage decisions to RNHCIs." Pet. App. 27. The Act's text "makes clear that an RNHCI offers only an initial recommendation regarding * * * coverage." *Id.* at 28. "This recommendation must contain information regarding the RNHCI's coverage determination and any other information that the Secretary may deem necessary," and is "subject to substantial and meaningful review by the Secretary" or a designated "fiscal intermediary" such as a private insurance company. *Id.* at 25 n.8, 28. The court thus found "no reason to question the soundness of Congress's judgment that the Secretary generally will be able to make a competent coverage determination." *Id.* at 29.

Finally, the court of appeals rejected petitioners' as-applied claim that the statutes "provid[e] direct funding for religious activity" in "pervasively sectarian" facilities. Pet. App. 25-26. "[S]ection 4454 authorizes payment only for * * * bed and board and such other physical care services that are ordinarily furnished by health care facilties," and "do[es] not fund the spiritual healing services that may take place within RNHCIs." *Ibid.* Moreover, "an institution is not pervasively sectarian if its

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[7] The court also rejected the argument that this Court's statement in *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997), that aid recipients "may not be defined 'by reference to religion,'" invalidated the statutes. Pet. App. 19. Applying such a rule to religious accommodations would require invalidating all such laws, which "are specifically designed to alleviate government-imposed burdens on religious practice" and necessarily define their beneficiaries on religious grounds. *Ibid.* But in any event, the court explained, the aid received by program beneficiaries is "not in any way special, or above and beyond [that] which medical patients receive." *Id.* at 25. Petitioners badly distort the decision below in claiming that the court "ignore[d]" *Agostini*. Pet. 6. The court distinguished that case, provided a careful explanation of its reasoning, and treated a different line of precedent as controlling.

primary function is secular and if this function can be effectively separated from its religious activity." *Id.* at 26. Since it is undisputed that Christian Science sanatoria provide many of the same secular nursing services that medical facilities provide — for example, they "bandage sores" and "change bed pans" — and since such services "are distinct and separable from any religious activity that may take place within such facilities," the court found no merit in petitioners' as-applied claim. *Id.* at 30 (citing petitioners' affiant).

Judge Lay dissented. In his view, "an accommodation cannot benefit only particular religions or benefit all religions but not nonreligious organizations." Pet. App. 44.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari. Petitioners have pointed to no genuine conflict with prior decisions of this Court or with any other circuit. They say the law on legislative accommodations of religion is in disarray, but the cases they cite involve wholly dissimilar facts and legislation, and most of them merely confirm that the decision below is correct. The challenged provisions are a modest part of Medicare and Medicaid, involving relatively small outlays, and petitioners themselves characterize the provisions as "unusual" and "eccentric." Pet. 23, 29. Thus, a decision on the merits would appear to be of little help in resolving other cases.

Quite apart from petitioners' claims of "conflict," a host of other factors demonstrate that this is an inappropriate case for a grant of certiorari. The petition is full of factual distortions and misrepresentations of the statutes. When this hyperbolic rhetoric is set aside, the statutes do not raise any of the issues that petitioners wish to debate. Petitioners raise no serious doctrinal disagreement with the court of appeals, but merely dispute whether that court properly applied settled precedents to the particular statutes under review. Moreover, as petitioners

acknowledge, another suit raising the same issues was recently filed in a different circuit. If that case produces a conflict, it will be time enough to address the questions presented.

There are also serious doubts about petitioners' standing. Their principal claim is one of unequal treatment — that the statutes discriminate among religious sects — but since petitioners do not wish to obtain a similar accommodation, they are not injured in the slightest by the *limitation* of the challenged statutes to eligible religious facilities.

Finally, the decision below is consistent with this Court's precedents. It is well settled that religious organizations may deliver publicly funded health care, and other poor and elderly Americans are entitled to seek such care at the hospital of their choice, be it a religious or secular facility. The challenged accommodations merely ensure that those who are religiously opposed to undergoing medical treatment receive a small portion of the benefits that others receive. Congress's actions recognize the unfairness of having to pay taxes for benefits that one can never enjoy, and are thus representative of the best traditions of protecting religious liberty and ensuring broad access to health care.

I. The Petition Fails To Demonstrate Any Conflict Among The Circuits Or With This Court's Precedents.

The petition satisfies none of the traditional criteria for granting certiorari. To begin with, petitioners cite no genuine conflict with a decision of any other circuit. They say that the law on permissive accommodation is "in disarray" and that "guidance is sorely needed." Pet. 17. But none of the cases they cite involves even remotely similar facts or legislation. The purported conflict is purely imaginary.

The leading case cited by petitioners, *Lamont* v. *Woods*, 948 F.2d 825 (2d Cir. 1991), bears absolutely no resemblance to the instant case. It involved a challenge to the federal funding of

religious schools abroad, and the focus of the court's decision was on whether the Establishment Clause applied extraterritorially. No one claimed to be burdened by the program. The word "accommodation" appears nowhere in the opinion. And the court, which did not reach the merits of the establishment issue, held only that there is "no basis for distinguishing between foreign and domestic establishments." *Id.* at 840.

Elewski v. *City of Syracuse*, 123 F.3d 51 (2d Cir. 1997), is even further afield. The court there addressed an establishment challenge to a city's display of a creche along with various secular symbols such as wreaths, lights, and reindeer. *Id.* at 52. The case did not involve any sort of government benefit or statutory accommodation, and the court simply applied the governing standard in that context — whether reasonable observers "would perceive a celebration of the diversity of the holiday season" rather than an "endorsement of Christianity" — in upholding the display. *Id.* at 55.

Petitioners do cite several accommodation cases arising in dissimilar factual contexts, but these cases merely confirm the correctness of the decision below. In *Ehlers-Renzi* v. *Connelly School*, 224 F.3d 283 (4th Cir. 2000), petition for cert. filed (Jan. 8, 2001) (No. 00-1118), the Fourth Circuit upheld a provision that exempted property used for religious schools from certain use restrictions. In *Cohen* v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), the Seventh Circuit upheld an ordinance that exempted religious day care centers from having to obtain a special use permit to locate in a residential area. And in *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), cert. denied, 121 S. Ct. 759 (2001), the First Circuit upheld a state law that protected religious property uses from exclusionary zoning by local officials. See also *Forest Hills Early Learning Ctr.* v. *Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988) (upholding a licensing exemption for religious day care centers).

These cases involved zoning rather than public benefits, and thus would not conflict with the decision below even if they had come out the other way. Nonetheless, it is telling that the federal appellate courts have consistently held that these sorts of regulatory exemptions serve not to advance religion, but to relieve religious entities from government restrictions that threaten to interfere with their autonomy and to violate the separation of church and state. See *Ehlers-Renzi*, 224 F.3d at 291; *Boyajian*, 212 F.3d at 7-10; *Cohen*, 8 F.3d at 491-493. These cases therefore reflect not a "confused state of Establishment Clause doctrine" in the lower federal courts (Pet. 16), but uniformity.

Petitioners cite an accommodation case involving education benefits, *Stark* v. *Independent School District*, 123 F.3d 1068 (8th Cir. 1997), cert. denied, 523 U.S. 1094 (1998), but that decision merely confirms that the state may accommodate religion within a benefit program. *Stark* held that it is constitutional for public school districts — whose actions traditionally have received greater establishment scrutiny than have government health care programs — to accommodate religious minorities who object to certain aspects of technology-based education. The court rejected many of the same arguments in *Stark* that were rejected by the court below. If the case had come out the other way, it might conceivably have produced a conflict.

Petitioners also claim that the decision below conflicts with *Grumet* v. *Pataki*, 720 N.E.2d 66 (N.Y.), cert. denied, 528 U.S. 946 (1999), a case involving public education and not health care. But as the court below recognized, that was a case in which the statute, while purporting to allow all cities to form their own school districts, "contained arbitrary wealth criteria that largely controverted any purported secular basis for the lines drawn by the statute," and in which the "legislative history evidenced an intent to extend a benefit to a single religious sect." Pet. App. 12 n.5; see also 720 N.E.2d at 72 (the statute

"potentially benefits only the Village of Kiryas Joel and one other of the State's 1,545 municipalities"). Here, by contrast, the statute is drawn in "sect-neutral" terms, Congress intended to aid "any person" who is religiously opposed to receiving medical care, and the effect is merely to provide beneficiaries with a *subset* — the nonmedical portion — of the benefits that other poor and elderly Americans receive. H.R. CONF. REP. at 768. *Grumet* is therefore inapposite.

Unable to point to any actual conflict on comparable issues, petitioners resort to speculation. The decision below "demands correction," they say, "before it plays havoc" in cases involving "vouchers" or "charitable choice" and "swallows the Establishment Clause whole." Pet. 16.

This argument is frivolous. Voucher and charitable choice cases deserve to be judged on their own merits. This Court has often observed that establishment questions are fact-specific, and that no single theory resolves every case. See, *e.g.*, *Board of Educ. of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part) (no "single test" or "Grand Unified Theory" resolves all cases; "the same constitutional principle may operate very differently in different contexts"). Thus, even if it is true that the courts applied different "analytical structure[s]" (Pet. 17) in the cases cited by petitioners (which themselves arise in highly dissimilar contexts), that is neither surprising nor unusual.

Petitioners note that another lawsuit was recently filed raising the same claims that are raised here, as if that were a reason to grant certiorari in this case. See *Kong* v. *Min De Parle*, No. C-00-4285-CRB (N.D. Cal. filed Nov. 16, 2000); Pet. 23 ("this issue is certain to recur"). In fact, this confirms that there is no need for the Court to address the issue at this time. If the Ninth Circuit in *Kong* likewise concludes that the statute is constitutional, as we would expect, this will confirm that no review is needed by this Court. If the Ninth Circuit concludes otherwise, it will be time enough for this Court to

resolve the conflict. Until an actual conflict arises, however, there is no need for the Court to spend its limited resources on a case where the only basis for certiorari is speculation that the reasoning of the court below may spread to other areas involving dissimilar facts and legislation.

Likewise, petitioners have pointed to no conflict with prior decisions of this Court. To be sure, they assert that the decision below "flies in the face of * * * all of this Court's applicable government-aid-to-religion decisions" (Pet. 16), and they string together various snippets — often from plurality or dissenting opinions in inapposite cases — in an effort to support such a claim. Pet. 20-22. But one searches the petition in vain for a summary of the facts or an explanation of the holding of these decisions, and petitioners make no serious effort to show that they conflict with the ruling below.

The suggestion (Pet. 20) that the decision below conflicts with *United States* v. *Lee*, 455 U.S. 252 (1982), is especially puzzling. *Lee* was a *free exercise* case, and the Court held only that Congress was not *required* to exempt Amish employers from payment of social security taxes. The Court in no way suggested that such taxes did not impose a burden on religious exercise. On the contrary, the Court held that they *did* impose such a burden, but that Congress had a compelling interest in ensuring broad participation in the tax system. See *id.* at 257 ("[Whether] there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning * * * of the inquiry. Not all burdens on religion are unconstitutional.").

Moreover, in declining to expand the tax exemption that Congress provided in 26 U.S.C. § 1402(g), the Court expressly approved of that provision's accommodating features:

> Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the

> social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

455 U.S. at 260-261. *Lee* thus supports the decision below: just as Congress validly accommodated those who oppose participating in all social security benefits, so has Congress validly accommodated those who oppose participating in the medical component of federal health care benefits.

Nor does the decision below conflict with *Bowen* v. *Roy*, 476 U.S. 693 (1986). The Court there rejected a free exercise challenge to the requirement that indigent persons be assigned a social security number in order to receive food stamps. However, the Court's plurality — upon which petitioners rely (Pet. 21) — expressly acknowledged that "[a]n exemption adopted by Congress to accommodate religious beliefs such as [these] would not violate the First Amendment's Establishment Clause." *Id.* at 712 n.19 (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963)). "As a matter of legislative policy," Congress is free "to make religious accommodations to a general and neutral system of awarding benefits." *Id.* at 712. Thus, *Roy* supports the result below.

The remaining decisions cited by petitioners have even less relevance to this case. *Mitchell* v. *Helms*, 530 U.S. 793 (2000), and *Agostini* v. *Felton*, 521 U.S. 203 (1997), held that funds provided to religious entities may not be diverted to religious uses. But the statute here expressly limits reimbursement to secular items and services, 42 U.S.C. § 1395x(ss)(1)(C), and both of the lower courts found as a factual matter that there is no reimbursement of any religious activity. Pet. App. 29-30; C.A. App. 917. Moreover, neither *Mitchell* nor *Agostini*

involved an accommodation. And if courts indiscriminately applied the rule that a statute may not "define its recipients by reference to religion" (*Agostini*, 521 U.S. at 234), then *no* accommodation could be upheld, because *every* accommodation so defines its recipients.

II. The Petition Rests On Mischaracterizations Of The Statute, The Record, And The Holding Below.

Even if it otherwise satisfied the criteria for certiorari, the petition should be denied because it rests on fundamental mischaracterizations of the statutes at issue. Indeed, the petition is filled with distortions of the record, the legislative history, the statutes, and even the rulings below. Space does not permit us to list all of them, but a few are especially egregious and confirm that the petition presents no issue worthy of review.

Petitioners misrepresent what the statutes pay for. They say that the statutes fund the entire "operating cost of faith healing sanatoria" and funnel "direct payments * * * into the coffers of religious bodies." Pet. 2, 15, 27. But the law limits payment to secular "items and services" (42 U.S.C. § 1395x(ss)(1)(C)) for persons having "a condition such that [they] would qualify for benefits under this part for inpatient hospital services" (*id.* § 1395i-5(a)(2)). Such items and services must be "comparable to services and related nursing materials supplied to inpatients in a hospital." H.R. CONF. REP. at 768. No money flows to any church or to religious education. Christian Science RNHCIs are not owned by, or under the control of, The First Church of Christ, Scientist, its Board of Directors, or any other ecclesiastical body. Congress expressly disavowed reimbursement "for the services of those who provide spiritual treatment through prayer." *Ibid.* And the implementing rules state that "[n]either Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities." 64 Fed. Reg. 67028, 67043 (Nov. 30, 1999).

Petitioners also distort the laws at issue by stating that they grant RNHCIs an "exemption from administrative oversight," leaving them "virtually free to determine [their] own coverage." Pet. 9. To begin with, an RNHCI's utilization review committee, like its medical counterpart, makes only initial coverage recommendations. 42 U.S.C. §§ 1395x(ss)(1)(H)-(J). Such recommendations are subject to plenary review by the Secretary (or a fiscal intermediary that he designates), an administrative board, and ultimately the courts, using precisely the same administrative machinery as is used in hospital cases. See *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 452-453 (1998). Moreover, contrary to petitioners' suggestion that one may obtain benefits without a showing of need (Pet. 8), the statute expressly provides that nothing therein shall "be construed as preventing the Secretary from requiring * * * the provision of sufficient information regarding an individual's condition as a condition for receipt of benefits." 42 U.S.C. § 1395x(ss)(3)-(A)(ii). Thus, RNHCIs hold no "ultimate decision-making authority" (Pet. App. 28), and the claim that they are "exemp[t] from administrative oversight" is baseless.

In addition, petitioners repeatedly say that the statutes provide their beneficiaries with a "special benefit" of "custodial care" that is unavailable to others. *E.g.*, Pet. 7, 16, 28. As both of the courts below observed (Pet. App. 21-25, 65), however, federal health care includes both medical and nonmedical components, and *any* ailing person is entitled to both of these components under the Programs. The challenged statutes simply make it possible for religious persons who object to receiving medical treatment to receive a *subset* — the nonmedical portion — of the health care that other poor and elderly persons receive. That is not a "special" benefit.

Petitioners insist that the benefits here are different because they are not "rendered under physician supervision." Pet. 7 n.5. But there is nothing inherently *medical* about changing bed pans, providing "assistance in moving, turning, positioning, and

ambulation," "meeting nutritional needs," and helping patients keep clean. 64 Fed. Reg. at 67030. By the terms of the statutes, payment is limited to services and items that are "comparable to services and related nursing materials supplied to inpatients in a hospital or a medical skilled nursing facility." H.R. CONF. REP. at 768. Moreover, benefits are available "only if the individual has a condition such that the individual would qualify for benefits * * * if the individual were an inpatient or resident in a hospital or skilled nursing facility that was not [an RNHCI]" (42 U.S.C. § 1395i-5(a)(2)), and the implementing regulations direct that if it is not possible to "establish necessity or appropriateness of care," the RNHCI must recommend that "the patient's admission, extended stay, or other services not be approved for payment." 64 Fed. Reg. at 67036. In sum, the court of appeals correctly found that beneficiaries are "never reimbursed for services for which medical patients are not similarly reimbursed." Pet. App. 23-24.

Next, petitioners resort to allegations of congressional bad faith. They acknowledge that the statutes "do not specifically name any religious sect," but claim that the amendments were only a "cosmetic change" and that the "obvious intent of Section 4454 [was] to maintain the status quo." Pet. 5, 26.

This is without foundation. As the lower courts noted, the legislative history makes clear that Congress enacted "a *sect-neutral* accommodation available to *any* person * * * for whom the acceptance of medical health services would be inconsistent with his or her religious beliefs." H.R. CONF. REP. at 768 (emphasis added). To be sure, Congress was aware of the *CHILD I* decision and the fact that Christian Scientists are the most conspicuous example of a group requiring this type of accommodation. But the fact that various Senators may have referred to Christian Scientists in the floor debate, or indicated their intent to "continue" the benefits made available under prior law, is hardly a valid basis to question Congress's stated intention to broaden the statute. Congressional acts are entitled

to a strong presumption of constitutionality, *Bowen* v. *Kendrick*, 487 U.S. 589, 617 (1988), particularly "when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). "[T]he fact that Congress concluded * * * that the original exemption was unnecessarily narrow is a decision entitled to deference, not suspicion." *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327, 338 (1987).[8]

As for petitioners' "as applied" challenge, both of the lower courts found that Christian Science nursing facilities are not pervasively sectarian and that there is no reimbursement of any religious activity. Pet. App. 29-30; C.A. App. 917. Petitioners claim that the lower courts misapplied the summary judgment standard, "adopt[ing] those facts from the summary judgment record which supported [their] conclusion" and "ignor[ing]" the rest. Pet. 9-10. But even if this were true (and it is not), it would not justify review.[9] This Court has repeatedly said that it does not grant certiorari to reexamine the record, and this principle applies with special force where the lower courts are in agreement about the facts. See, *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts"). In short, there is no reason for this Court to grant review where

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[8] Petitioners also claim that Christian Science nursing facilities are the only facilities that may participate. Pet. 2-3. All that is known, however, is the number of facilities that have *already* qualified, not the number that *will* qualify, and petitioners concede that those "who have practices similar to the Christian Science sanatori[a] are eligible." C.A. App. 781. In any event, even if petitioners were correct, that would not invalidate the statute. If a facially neutral accommodation were invalid because it yielded benefits to only one or a small number of religious sects — because of its "disparate impact" — then religions with unique needs could never be accommodated.

[9] The court below cited petitioners' own evidence in support of the conclusion that Christian Science nursing facilities provide many of the same physical services that are provided in medical facilities. Pet. App. 30.

the basis for the claim is that the lower courts misinterpreted the record. See S. Ct. Rule 10 ("[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").[10]

Stripped of statutory misrepresentations and factual distortions, the petition presents no issue worthy of review. The statutes do not pay for any religious activity. Congress clearly intended to accommodate anyone who is religiously opposed to receiving medical treatment. RNHCI admission decisions are subject to several layers of review. And statutory beneficiaries receive only a subset of the benefits that others receive. In short, the "question presented" — whether Congress may provide "unique benefits" to Christian Science — is not presented at all.

III. The Establishment Clause Permits Accommodation Of Religious Persons Who Require Nonmedical Health Care.

Review is also unwarranted because the petition merely questions whether the courts below properly applied settled doctrine to the unusual statutes at issue. Indeed, beyond their rhetoric about "religio-centric" benefits, petitioners offer no alternative framework to analyze accommodations. They agree that such provisions must remove a burden on religion; they simply disagree that the statutes here do so. They agree that accommodations may not substantially burden others; they

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[10] The Court should also be wary of making new law regarding religious expenditures in the context of health care in a case — like this one — that is atypical. Medicare traditionally has reimbursed hospitals for inpatients' religious pastoral care because of the "beneficial therapeutic effect on the medical condition of a patient." *Baylor Univ. Med. Ctr.* v. *Blue Cross Ass'n*, No. 82-D59, Medicare & Medicaid Guide (CCH) ¶ 31,871, at 9314 (Provider Reimbursement Review Board Feb. 25, 1982), aff'd, Medicare & Medicaid Guide (CCH) ¶ 31,971 (Apr. 21, 1982) (HCFA Deputy Adm'r Dec'n). See also AMERICAN HOSPITAL ASS'N, STATEMENT ON HOSPITAL CHAPLAINCY (1967) and related bulletin (C.A. App. 662).

simply think the statutes here fail that test. They make no claim that religiously affiliated facilities may not provide publicly funded health care; they simply argue that this does not include RNHCIs. It thus appears that petitioners are at most asserting that the court of appeals "misappli[ed] * * * a properly stated rule of law." S. Ct. Rule 10. Even if they were correct, that would not justify this Court's review. But as shown below, the decision below is directly supported by this Court's precedent.

Petitioners argue that the accommodations are an unlawful "special benefit." *E.g.*, Pet. 7, 16, 28. First, they say that the statute unlawfully singles out religion for different treatment. *Id.* at 23, 26, 28. Second, they say that the state may not accommodate religion in the context of a "benefit program." *Id.* at 22.

Neither argument has merit. As for the claim that the laws are invalid because they single out religion, such a rule would invalidate all accommodations and is foreclosed by this Court's decisions. See, *e.g.*, *Amos*, 483 U.S. at 338 (rejecting the claim that laws that "singl[e] out religious entities for a benefit" or "give special consideration to religious groups are *per se* invalid"); *Kiryas Joel*, 512 U.S. at 705. As the Court stated in *Amos*, provided "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion," there is "no reason to require that the exemption come packaged with benefits to secular entities." 483 U.S. at 338.

Petitioners assert that having to pay taxes for benefits that one cannot in good conscience receive is not a religious burden. But this Court has repeatedly held that being put to a choice between following one's faith and forgoing public benefits *is* such a burden. *Frazee* v. *Illinois Dep't of Employment Sec.*, 489 U.S. 829, 832, 835 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987); *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-718 (1981); *Sherbert*, 374 U.S. at 404. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith * * * , thereby putting

substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-718.

Petitioners say that relieving such a burden is inconsistent with cases such as *Lee*, *Roy*, and *Employment Division* v. *Smith*, 494 U.S. 872 (1990). But while those decisions narrowed the circumstances in which the Free Exercise Clause *requires* accommodating religion, they in no way cast doubt on statutes that *exceed* constitutional requirements. This Court has often held that "the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970); *Kiryas Joel*, 512 U.S. at 705-706; *Hobbie*, 480 U.S. at 144-145. Thus, Congress is entitled to substantial latitude in deciding what sort of tax burdens justify accommodation. *Roy*, 476 U.S. at 712.

Petitioners also suggest that accommodations have no place in "benefit programs." Pet. 22. But that argument is supported neither by precedent nor by common sense. *Sherbert* expressly rejected the claim that it established religion to grant a religious exemption from an eligibility requirement for such a program. Such exemptions, the Court held, "reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. at 409. There, as here, the religious adherent received no more benefits than her secular counterparts, and in both cases accommodation is but a means of achieving neutrality of result. Congress has simply made the kind of accommodation here that was held to be constitutionally required in *Sherbert*. See also *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952) (rejecting the claim "that public institutions can make no adjustments * * * to accommodate the religious needs of the people").

Petitioners' remaining arguments are also unavailing. For example, their sect-discrimination claim is but a disagreement over the application of settled law to this particular legislation.

The court below agreed that "discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect while in operation." Pet. App. 8. It simply found that the relevant "terms, legislative history, and effect all suggest denominational neutrality." *Ibid.* Given the clear statements in the legislative record (see *supra* pp. 6-8, 22) and the fact that one can qualify "simply by stating that he or she is 'conscientiously opposed' to medical treatment and that such treatment is 'inconsistent with his or her sincere religious beliefs'" (Pet. App. 8), that conclusion is unassailable.[11]

Finally, there is no basis to petitioners' fact-bound "as applied" claim. They fail to cite the standard for determining whether an organization is "pervasively sectarian" — whether its secular function can effectively be separated from its religious activity. *Roemer* v. *Board of Pub. Works*, 426 U.S. 736, 753-754, 762 (1976) (plurality op.). That standard is easily satisfied here. Reimbursement is strictly limited to inherently secular services — bed, board, nursing services, and supplies. See *supra* pp. 6-7, 22. And petitioners' own affiants admit that Christian Science nurses provide patients with physical care services such as bathing, assistance with movement, and cleansing wounds. Pet. App. 30; C.A. App. 183, 818.

The fact that Christian Science sanatoria are religiously affiliated, or that their nurses may be religiously motivated, is also legally irrelevant. *Kendrick*, 487 U.S. at 613; *Bradfield* v. *Roberts*, 175 U.S. 291, 298 (1899). Indeed, given the strictly secular nature of these services, they could be provided at state

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[11] Even if the amended law were subject to strict scrutiny, it would easily withstand that analysis. As the district court stated in *CHILD I*, "the interest in accommodating religious beliefs in the context of generally available public welfare programs, in order to ensure that all those who pay taxes to support the programs may benefit from them, is a sufficiently compelling interest to survive the first prong of strict scrutiny review." Pet App. 104. It invalidated the earlier statute only because it "explicitly address[ed] institutions of a single religion." *Id.* at 89. That infirmity no longer exists.

expense even if the nursing facilities *were* deemed to be pervasively sectarian. See *Wolman* v. *Walter*, 433 U.S. 229, 242 (1977) (upholding provision of "physician" and "nursing" care in religious elementary schools), overruled in part on other grounds, *Mitchell* v. *Helms*, 530 U.S. 793 (2000).

Thus, neither the facial nor the as-applied portion of petitioners' case raises any significant unsettled questions of constitutional law. At best, petitioners merely ask this Court to examine whether the lower courts correctly applied settled law.

IV. Petitioners' Principal Claim Is Undermined By Serious Article III Standing Problems.

Serious standing questions make it doubtful that the Court could reach the merits of this case even if it granted review. Petitioners' principal claim is that Christian Scientists receive "special benefits" that are unavailable to an "atheist or agnostic who does not trust the medical system" or to "any other organization." Pet. 23, 28. Their challenge thus rests on the claim that the accommodations are *underinclusive* — that, to be constitutional, payment for nonmedical nursing care must be extended to others not before the Court.[12]

The trouble with this claim is that petitioners are not injured in the slightest by the statutes' *limitation* to religious nonmedical health care facilities, since they do not claim to be members of any group that desires to be included in the accommodations. In order to establish Article III standing, petitioners must prove that they *personally* have suffered an injury that is traceable to the defendants' conduct and redressible by a favorable decision. *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Chris-*

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[12] We concede, of course, that petitioners have standing as taxpayers to challenge any expenditure of public money for religious purposes. *Flast* v. *Cohen*, 392 U.S. 83 (1968). But that part of their case was rejected by both courts below on the basis of the factual record (see *supra* pp. 23-24) and raises no certworthy question.

tian College v. *Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982). Thus, claims that a statute is constitutionally underinclusive may only be brought by persons injured by the alleged underinclusiveness — similarly situated persons who have been denied the benefits granted to others. *Amos*, 483 U.S. at 338 n.16; *Allen*, 468 U.S. at 751; *Heckler* v. *Mathews*, 465 U.S. 728, 739-740 (1984).

Petitioners do not claim to have sought and been denied nonmedical care under the statutes. Their sole asserted injury is that of taxpayers who "object" to the "religious theology" of Christian Science. C.A. App. 3 (Compl. ¶¶ 4-6). To support their claim of standing, they cite *Flast* v. *Cohen*, 392 U.S. 83 (1968), which held that those challenging an imposition of "compulsory taxation for religious purposes" must establish "a logical link between th[eir] status [as taxpayers] and the type of legislative enactment attacked," and "a nexus between that status and the precise nature of the constitutional infringement alleged." *Id.* at 87, 102. But petitioners' claim that the accommodations are *too narrow* — that Congress must broaden them — runs directly contrary to their interest as taxpayers.

Petitioners cannot possibly gain anything of value from this lawsuit — unless injury to poor and elderly persons who adhere to a "religious theology to which [they] objec[t]" (C.A. App. 3) can be deemed a benefit. See *Valley Forge*, 454 U.S. at 486 (ideological "fervor" does not confer standing). Any injury caused by the decision to draft the statutes in terms that accommodate only religious nonmedical care is felt only by hypothetical, similarly situated groups that have been denied a similar accommodation. Petitioners assert that such a group is "unknown to anyone in this litigation." C.A. App. 38. Thus, this case is precisely the sort of "'abstract' or 'conjectural' or 'hypothetical'" suit that standing doctrine is intended to preclude (*Allen*, 468 U.S. at 751), and it would be a waste of this Court's resources to grant review in a case that, upon full review, will likely prove nonjusticiable.

* * * * *

Finally, it merits emphasis that a decision invalidating the challenged provisions would impose extraordinarily harsh consequences on poor and elderly Americans who rely upon nonmedical health care as a matter of religious conscience. Medicare and Medicaid were designed to make health care accessible to all Americans, but, absent accommodation, this would be an empty promise for those who cannot accept medical treatment. This unfairness is compounded by the fact that the provisions at issue are longstanding, such that many elderly beneficiaries have been compelled to pay taxes to support them throughout their lives. Many who benefit from the statutes lack the financial wherewithal to purchase health care out of pocket. Absent accommodation, they will go without care.

Other Americans are entitled to reimbursement for health care at the hospital of their choice—be it a Protestant, Catholic, Jewish, or secular facility. As Congress concluded, to exclude Christian Scientists and others with similar beliefs from a portion of the benefits that others receive would thus be highly inequitable, especially to those who lack other means of obtaining care. See H.R. CONF. REP. at 768 ("it would be particularly harsh to cut off nursing benefits for [such] poor and elderly men and women * * * when other patients receive reimbursement for hospital care"). Congress's actions are thus representative of the best American traditions of protecting religious liberty and ensuring broad access to health care.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

TERRENCE J. FLEMING
ANSIS V. VIKSNINS
Lindquist & Vennum, PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 371-3211

MICHAEL W. MCCONNELL
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South La Salle Street
Chicago, IL 60603
(312) 782-0600

Counsel for Respondent The First Church of Christ, Scientist

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